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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1620

ESTATE OF ANNA WITKOWSKI; LEO WITKOWSKI, INDEPENDENT EXECUTOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's findings of fact and conclusions of law may be found in 71-1 U.S.T.C., par. 12,787, but are not officially reported. The opinion of the court of appeals (Pet. App. A) is reported at 451 F. 2d 1249.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1971 and, after the denial of a petition for rehearing, became final on January 17, 1972. By order of Mr. Justice Powell, the time for filing a petition for a writ of certiorari was extended to June 15, 1972, and the petition was filed on June 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly directed a verdict for the Government on the issue whether certain real property was subject to the decedent's general power of appointment and should therefore be included in her estate under Section 2041 of the Internal Revenue Code of 1954.

2. Whether the evidence supports the jury's finding that the decedent's gift of 140 acres of farm land to her sons and daughters-in-law (made eight months before she died) constituted a transfer in contemplation of death under Section 2035 of the Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 2035 and 2041 of the Internal Revenue Code of 1954 and Sections 20.2035–1 and 20.2041–3(d)(1) of the Treasury Regulations on Estate Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

Power of Appointment Issue

The decedent died testate on April 20, 1965, leaving all her property to her two sons. (Pet. App. A, pp. 2, 4.) During their life together, decedent and her husband, Frank, had acquired as community property a 684.2-acre tract of land in Deaf Smith County, Texas. (Pet. App. A, p. 2.) Upon Frank's death in 1957, the decedent acquired his community share of the farm under the following testamentary provisions (Pet. App. A, pp. 2–3, 9):

> It is my will and I hereby give, devise and bequeath unto my beloved wife, ANNA WIT-

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KOWSKI, all of my property, both real, personal and mixed wherever the same may be located, during her life time, she is to have the complete use, occupancy and enjoyment of the same and to receive all rents, revenues and income therefrom during her life time and she shall have the full and complete right to sell, exchange, invest, re-invest, mortgage, lease and to do any and all things with such property, real, personal and mixed as she may see fit and proper, her judgment in all such matters being fully binding.

It is my will that any of my said properties remaining in the hands of my beloved wife, Anna Witkowski, at the time of her death, shall pass to and vest in my three children, to wit: Vernon Witkowski, my son; Winifred Witkowski Heavin, my daughter; and Leo Witkowski, my son, jointly, share and share alike.

The decedent's daughter, Winifred W. Heavin, and Winifred's husband had operated the farm from 1954 until Frank's death in accordance with an oral agreement between the two couples. After Frank's death the Heavins stayed on under a similar agreement with the decedent. (Pet. App. A, p. 3.) In 1959, the Heavins and the decedent's other children entered into an agreement which, "subject to the provision that we inherit the above described land, share and share alike, from our said mother [the decedent]," described the manner in which they would divide the farm among themselves.

Relations between the decedent and her sons, on the one hand, and the Heavins, on the other, deteriorated after that time. (Pet. App. A, p. 3; Stip. Ex. 2, p. 2.)

On April 30, 1964, Winifred and her husband filed in the Deed Records of Deaf Smith County an "Affidavit of Equitable Ownership" in which they claimed ownership of equitable title to the middle one-third of the farm under their oral agreement of 1954 with the decedent and Frank. On August 12, 1964, the decedent executed a will, leaving all her property to her two sons, and on August 17, 1964, she transferred an undivided interest in 140 acres of the farm to her sons and daughters-in-law as gifts. (Pet. App. A, pp. 3–4.)

Finally, on October 26, 1964, the family found a basis upon which to compromise its differences. In return for $21,000 and some machinery, the Heavins agreed to forego all their claims to the farm and signed a quitclaim deed to that effect. They also agreed to waive certain personal claims against the decedent and the two sons. The decedent and her sons raised the money necessary to satisfy Winifred and her husband by mortgaging the farm. Decedent orally promised her sons that she would leave her possessions to them when she died if they helped her obtain that loan. (Pet. App. A, p. 4; Findings of fact of district court, pp. 3–4.)

The district court directed a verdict in favor of the government on this issue, holding (1) that under her husband's will, the decedent was given a general power of appointment over his community share of their farm, (2) that the various disputes, claims, counterclaims, offers and compromises had done nothing to diminish decedent's appointive power, and (3) that the value of the appointive property was thus includible in her estate under Section 2041 of the Internal

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Revenue Code of 1954. (Conclusions of law of district court, pp. 5–9). The court of appeals affirmed.

Contemplation of Death Issue

The gifts of farm land on August 17, 1964, at which time decedent was 74, were made five days after the decedent had executed her will. As her attorney testified, decedent intended that these gifts would be "a part of an estate planning procedure that she initiated." The attorney acknowledged that decedent was motivated at least in part by her desire "to reduce the estate and inheritance taxes" upon her estate. Although apparently in comparatively good health at the time of the gifts, decedent had been under treatment for cancer for ten years and succumbed to that disease only eight months after making the transfers in issue. (Pet. App. A, p. 7; Tr. 185–186.)

The district court submitted this issue to the jury, which found that the gifts were made in contemplation of death. The court of appeals affirmed, holding that the circumstances and the statutory presumption (Section 2035(b) of the Code) provided the jury with more than sufficient grounds for concluding that the gifts were transfers in contemplation of death and therefore taxable as such. (Pet. App. A, p. 7.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or other reason for further review.

1. Under Section 2041 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 11–13), the value of property over which a decedent holds a general power of appointment (created after October 21, 1942) is in-

cludible in his gross estate. Under the will of her husband, the decedent here was given a full life interest in his community share of their 684.2-acre farm. The decedent was additionally given the unrestricted right to "sell, exchange, invest, re-invest, mortgage, lease and to do any and all things with such property * * * as she may see fit and proper, her judgment in all such matters being fully binding." Frank's will also provided that any portion of this property remaining in decedent's hands at the time of her death was to go to their three children. (Pet. App. A, p. 9.) Under the applicable Texas rules of construction, the husband's will clothed decedent with full authority to consume the property devised to her. *Commercial Bank, Uninc., of Mason* v. *Satterwhite*, 413 S.W. 2d 905 (Tex.); *Harrell* v. *Hickman*, 147 Tex. 396, 215 S.W. 2d 876. Such an unlimited power clearly constitutes a "general power of appointment" within the meaning of Section 2041(b)(1) of the Code, see *Morgan* v. *Commissioner*, 309 U.S. 78, and renders the property subject to the power includible in the holder's estate, *Lehman* v. *United States*, 448 F. 2d 1318 (C.A. 5); *Phinney* v. *Kay*, 275 F. 2d 776 (C.A. 5).

2. While petitioner concedes (Pet. 4; Conclusions of law of district court, p. 5; Pet. App. A, pp. 3, 4) that decedent was given a general power of appointment under the provisions of her husband's will, he alleges (Pet. 12–31) that decedent's appointive power was severely curtailed by events occurring after her husband's death and that at the time of her death she no longer possessed a general power of appointment over the farm. In support of this argument, petitioner

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points to the decedent's oral promise to leave all her property to her sons by will if they assisted her in obtaining the money to satisfy the Heavins, and to the fact that the sons did help obtain the funds. Petitioner says that this oral promise precluded the decedent from exercising her power without the consent of her sons, and that at the very least the jury should have been permitted to determine whether the exercise of decedent's authority was contingent upon the consent of the sons. The evidence adduced at the trial, however, falls far short of that required for petitioner to prevail. Texas law has long required that contracts to convey real property or contracts to make wills devising real property be evidenced by a written instrument signed by the promisor. Only if the purchaser-donee has been given possession of the real property, has made valuable improvements to that real property and has given consideration to the vendor-donor will the Texas courts enforce promises to convey which are not evidenced by written instruments.[1] *Hooks* v. *Bridgewater,* 111 Tex. 122, 229 S.W. 1114; *Meyer* v. *Texas Nat. Bank of Commerce of Houston,* 424 S.W. 2d 417 (Tex.); *Whittenburg* v. *Miller,* 139 Tex. 586, 164 S.W. 2d 497; *Manning* v.

[1] Some Texas cases appear to treat the presence of fraud by the promisor as an independent ground for avoiding the statute of frauds requirement that agreements to convey real property be evidenced by a written instrument. Cf. *Upson* v. *Fitzgerald,* 129 Tex. 211, 103 S.W. 2d 147. There is clearly not sufficient evidence of bad faith here to justify application of that exception to the statute of frauds. *Hooks* v. *Bridgewater,* 111 Tex. 122, 229 S.W. 1114; *Upson* v. *Fitzgerald, supra.*

Sammons, 418 S.W. 2d 362 (Tex. Civ. App.); *Harrell* v. *Walsh*, 249 S.W. 2d 927 (Tex. Civ. App.); 26 Tex. Juris. 2d, Frauds, Statute of, § 69.

Petitioner introduced proof only that consideration had passed from the sons to decedent. (Pet. App. A, p. 4.) In the absence of proof that the sons had been given possession of the farm[2] and that they had improved the property, Texas courts would not have enforced the decedent's promise. Moreover, the decedent's promise to leave her possessions to her sons when she died is not necessarily inconsistent with her power to deal with her possessions as she wished during her lifetime. Decedent was in no way foreclosed from exercising her powers over the land in favor of herself or her creditors. *Barrow* v. *Webb*, 208 S.W. 2d 157 (Tex. Civ. App.). Both of the courts below correctly held that a directed verdict was proper as to this issue because on the record and under Texas law neither son had any substantial adverse interest which could prevent the decedent from exercising her power of appointment.

3. Petitioner also asserts (Pet. 30) that the court below committed error in affirming the jury verdict

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[2] Decedent, even if she had partially exercised her general power in favor of her sons, retained a full income interest over the appointive property. (Tr. 176.) Such a reservation of rights over property which was once subject to a decedent's general power of appointment is itself sufficient to trigger the application of Section 2041(a)(2) and require inclusion of the appointive property in the decedent's estate. Treasury Regulations on Estate Tax (1954 Code), §§ 20.2041-2(c), 20.2041-3(d)(1) (Appendix, *infra*, p. 14); cf. *Gartland's Estate* v. *Commissioner*, 293 F. 2d 575 (C.A. 7), certiorari denied, 368 U.S. 954.

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that decedent's gifts of a portion of the farm land to her sons and daughters-in-law had been made in contemplation of death. There was substantial evidence, however, to support that verdict. The gifts were made as part of an estate plan and were motivated at least in part by a desire to reduce estate taxes. (Tr. 185–186.) A gift made with the "purpose of avoiding death taxes" is, by definition, a gift in contemplation of death. Treasury Regulations on Estate Tax (1954 Code), § 20.2035–1(c) (Appendix, *infra*, p. 14); *Allen v. Trust Co. of Georgia*, 326 U.S. 630. Moreover, while in apparent good health at the time of the gifts, the decedent had been engaged in a ten-year fight against cancer. Eight months after the transfers in issue, she died of that disease. (Pet. App. A, p. 7.) One of the "conflicting inferences and conclusions" (*Baker* v. *Texas & P.R. Co.*, 359 U.S. 227, 229) a reasonable man might draw from that evidence is the one reached by the jury—that the decedent's dominant motive was of the sort that leads to testamentary disposition. See *United States* v. *Wells*, 283 U.S. 102.

4. Petitioner does not allege that the decision below conflicts with other decisions, but contends that the courts below misinterpreted Texas law and did not apply it properly to the peculiar facts of this case. For the reasons given above, we submit that this contention is without merit. In any event, a case which turns upon construction of state law doctrines, and which involves a peculiar factual situation is not likely to give rise to a conflict of decisions and does not require review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
LORING W. POST,
MICHAEL L. PAUP,
Attorneys.

AUGUST 1972.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) [as amended by Sec. 18(a)(2)(C), Revenue Act of 1962, P.L. 87–834, 76 Stat. 960] *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

SEC. 2041. POWERS OF APPOINTMENT.

(a) [as amended by Sec. 18(a)(2)(H), Revenue Act of 1962, P.L. 87–834, 76 Stat. 960] *In*

General.—The value of the gross estate shall include the value of all property—

* * * * *

(2) *Powers created after October 21, 1942.*—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

* * * * *

(b) *Definitions.*—For purposes of subsection (a)—

(1) *General power of appointment.*—The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

(B) A power of appointment created on or before October 21, 1942, which is exercisable by

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the decedent only in conjunction with another person shall not be deemed a general power of appointment.

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person—

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the power—such power shall not be deemed a general power of appointment.

(ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent—such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

(iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person—such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

* * * * *

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2035–1 *Transactions in contemplation of death.*

* * * * *

(c) *Definition.* The phrase "in contemplation of death", as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

* * * * *

§ 20.2041–3 *Powers of appointment created after October 21, 1942.*

* * * * *

(d) *Releases, lapses, and disclaimers of general powers of appointment.* (1) Property subject to a general power of appointment created after October 21, 1942, is includible in the gross estate of a decedent under section 2041(a) (2) even though he does not have the power at the date of his death, if during his life he exercised or released the power under circumstances such that, if the property subject to the power had been owned and transferred by the decedent, the property would be includible in the decedent's gross estate under section 2035, 2036, 2037, or 2038. * * *

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